

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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P.O. Box 30212
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September 1, 2009

Mr. Corbin Davis
Supreme Court Clerk
P.O. Box 30052
Lansing, Michigan 48909

Re: ADM File No. 2009-04 – Proposals Regarding Procedure for Disqualification of
Supreme Court Justices

Dear Mr. Davis:

In anticipation of the public hearing on September 2, 2009 regarding the proposed revisions to Michigan Court Rules governing recusal, I would like to offer a few written comments on a single issue – whether a decision by a justice refusing to recuse may be subject to review. In my opinion, this is the paramount issue.

I recommend that this Court retain its current practice.

The decision of a justice on whether to disqualify should not be subject to review. Otherwise, the authority of the Court to make final decisions on Michigan law, which has been constitutionally entrusted to the seven justices, will be transferred – where there is a disqualification challenge – to the Chief Justice or to a majority of the Court. In order to protect the institutional integrity of the Court, the authority of each of the seven justices to sit should remain with each justice.

Under any appellate process, there is a final decision and a point at which a decision is no longer subject to review. The constitutional scheme in Michigan has placed the final authority of Michigan law in the seven justices under Article VI, § 2. This is a matter of design.

The appellate process in Michigan, like other States, is structured as an inverted pyramid. The process generally begins with a decision of a single trial judge, which may be appealed to a three-judge panel, which may further be appealed to the Michigan Supreme Court, a seven-member body.

The final decisions on Michigan law are thereby rendered by this seven-member Court. A majority of the justices voting then speaks for the Court under MCR 7.316(C). A process that allows a subset of this membership to determine which other members may properly sit nullifies this scheme and allows the Chief Justice or four justices the authority to determine the membership of the Court for a particular case.

Significantly, the Michigan Constitution specifically does not confer the power on the Supreme Court to "remove a judge," see Art. VI, § 4, but rather invests this authority in the Governor and the Legislature under Art. VI, § 25. But the authority to disqualify a fellow justice from reviewing a case has the same effect as removing that justice from that particular decision.

Of the three proposals, two specifically contemplate an appeal process when a challenged justice denies the motion for disqualification. In Alternative B, the decision may be appealed to the Chief Justice if the challenged justice denies the motion, or to the rest of the Court if the challenged justice is the Chief Justice. In Alternative C, where the motion to disqualify is denied, the party may appeal the recusal decision to the entire Court. Thus, the final decision on the composition of the Court when a party (or a justice in Alternative B) raises the issue of disqualification is either with (1) one justice – the Chief Justice; or (2) a majority of the remaining members of the Court, which is ordinarily four justices. In other words, either one justice or four justices may determine who may sit on the case, and this decision would effectively not be subject to review unless it implicated the United States Supreme Court decision in *Caperton v A.T. Massey Coal Company*, 129 S Ct 2252 (2009).

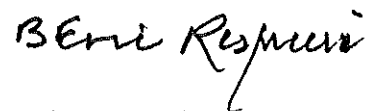
Justice Weaver notes in her concurrence to the order of this Court inviting comment that "the person who may be the least capable of recognizing a justice's actual bias and prejudice, or appearance of bias and prejudice, is the justice himself." See March 18, 2009 order, ADM File No. 2009-04, slip op, p 14. This point is well taken. The danger in the current practice is that a member of the Court – or even a majority of the Court – may be actually biased and refuse to recuse themselves. This potential is troubling. But the cure is worse than the condition itself.

Alternatives B and C seek to resolve this potential problem by allowing either the Chief Justice (Alternative B) or a majority of the Court (Alternative C) to review the validity of another justice's recusal decision. But the danger in these alternatives is that a majority of the Court might wrongly disqualify other justices, or in an even more extreme example, Alternative B would allow the Chief Justice to disqualify the rest of the Court. This is the more significant structural danger because it allows a subset of the Court to determine the Court's membership for a particular case – the role of the seven in constituting the Court would thereby be diminished.

In order to ensure that the Michigan Supreme Court is constituted by seven justices with each having an independent vote as contemplated by Michigan's constitutional scheme, the process should rely on the oath of each individual justice and allow the justice to make a decision regarding recusal without subjecting this decision to the review of the other justices. The United States Supreme Court operates under this same process in which each justice decides the recusal issue without review by the remainder of the Court.

This Court should retain its current practice regarding review of an individual justice's decision on disqualification. This is the process that I believe will best protect this Court's integrity.

Sincerely yours,

A handwritten signature in black ink that reads "B. Eric Restuccia". The signature is written in a cursive, flowing style.

B. Eric Restuccia
Solicitor General